No. 2660

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

EL DORA OIL COMPANY, J. L. CAMPBELL, H. M. JACKSON and JOHN SHRADER, Doing Business Under the Firm Name of OHIO VALLEY CONSTRUCTION COMPANY, and JOHN SHRADER and T. J. GREEN,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court For the Southern District of California, Northern Division.

BRIEF ON BEHALF OF THE APPELLEE.

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FACTS.

This was a suit brought by the United States to recover land described in the bill of complaint, to-wit:

All of the Southeast Quarter of Section 32, Township 12 North, Range 23 West, San Bernardino base and meridian, situated in Kern County, State of California,

and to restrain numerous persons from trespassing on said land; to prevent the withdrawal of oil and gas therefrom; to prevent waste and damage to said land, and to conserve it for the purposes of the United States.

The bill of complaint, being duly verified, was used as an affidavit as a basis for motions for an injunction and the appointment of a receiver.

Numerous defendants, including the appellants, without filing answers or affidavits, appeared at the time the motions were argued and interposed a motion to dismiss, as appears on page 31 of the printed record. The grounds of the motion of appellants to dismiss were as follows:

> "* * * for insufficiency of facts to constitute a valid cause of action in equity against these defendants.
>
> "That it appears from said Bill of Complaint that the defendants entered upon the land described therein prior to the 1st day of April, 1910, and continued drilling a well thereon for the purpose of discovery of oil;
>
> "That defendants, from the 1st day of April, 1910, were continuing in diligent prosecution of work in good faith leading to discovery of oil on said land until or about October, 1910, when oil was discovered thereon in paying quantities;

"That defendants were in diligent prosecution of work in good faith leading to discovery of oil, on the 2d day of July, 1910, claiming under Mineral Locations made prior to the 6th day of March, 1910;

"That the basis of plaintiff's cause of action depends on an alleged withdrawal of said lands, described in plaintiff's Bill of Complaint, on the 27th day of September, 1909, by the Honorable, the Secretary of the Interior of the United States, and that the said alleged withdrawal of said land from entry on the 27th day of September, 1909, was unconstitutional, void, and of no force and effect, and beyond the authority of the Secretary of the Department of the United States, and contrary to the provisions of Chapter VI of Title 32 of the Revised Statutes of the United States, and the 'Act of Congress of February 11, 1897, at L. 526, and the Acts Amendatory thereof and Supplemental thereto.

"That it further appears that no withdrawal of mineral *is* (in) said land has been made."

The motion of the defendants to dismiss was overruled, and the District Judge on April 23, 1915, appointed a receiver. The appeal in this case is from that order appointing a receiver, and is under the provisions of Section 129 of the Judicial Code. The defendants in their motion to dismiss, which is quoted above, purported to recite the facts as alleged in the bill of complaint, but they do not do so. A sufficient statement of the allegations in the bill are herein summarized.

It is alleged the defendants, J. L. Campbell, H. M. Jackson, and John Shrader, now are, and at all the

times mentioned in the bill as to them were, co-partners doing business under the firm name of "Ohio Valley Construction Company." (R. 8.)

The defendant, El Dora Oil Company was, at all times mentioned as to it, a corporation. (R. 7 and 8.)

The necessary and proper jurisdictional facts are alleged.

The plaintiff now is, and ever since the Treaty of Guadalupe Hidalgo has been, the owner and entitled to the immediate and exclusive possession and enjoyment of all the land described, and of all petroleum, gas and other minerals therein contained. All of said land has been at all times, and now is a part of the public domain of the United States, except as withdrawn and reserved from entry, as alleged, and all of said land has at all times been oil-bearing land, containing rich deposits of petroleum and gas in paying quantities, and has at all times been chiefly valuable for petroleum and gas deposited therein, and has never contained minerals other than petroleum and gas. (R. 9-10.)

On the 14th day of September, 1908, the land was withdrawn by the Secretary of the Interior from settlement, entry and purchase under the non-mineral land laws of the United States. (R. 10.)

On June 9, 1909, the land was duly classified by

the Secretary of the Interior as oil-bearing land. (R. 10.)

On September 27, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him, duly and regularly withdrew and reserved said land (together with other contiguous public lands) from mineral exploration, and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws of the United States; and since said last named date none of said land has been subject to exploration for minerals or to the initiation of any right under any of the public land laws of the United States. (R. 10-11.)

On July 2, 1910, the President of the United States, under the authority legally invested in him, and especially by virtue of the provisions of the Act of Congress of June 25, 1910, entitled "An Act to Authorize the President of the United States to Make Withdrawal of Public Lands in Certain Cases." (36 Stat. 847), duly and regularly ratified, affirmed and continued in full force and effect said order of withdrawal and reservation of September 27, 1909, and further withdrew and reserved said land from all forms of location, settlement, selection, filing, entry or disposal, under the mineral or non-mineral public land laws of the United States, subject only to the provisions of said Act of Congress, and each of said orders of withdrawal and

reservation; and each of said orders of withdrawal and reservation have since been, and are now in full force and effect. (R. 11.)

The defendants (subsequent to January 1, 1910, entered upon the land and pretended to acquire and assert mineral rights therein, or to some part thereof, and have committed, and are now committing trespass and waste thereupon. (R. 11-12.)

The Midway Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of the United States, entered on the land and thereafter drilled and caused to be drilled an oil well, and extracted from the land and appropriated to its use large quantities of petroleum and gas. (R. 12.)

Subsequent to July 4, 1910, the defendant El Dora Oil Company, and other defendants, entered on said land and thereafter drilled oil wells and extracted from the land and appropriated to their use large quantities of petroleum and gas. (R. 13.)

It is also alleged that subsequent to July 5, 1910, several of the other defendants so trespassed upon said land and took oil and gas and appropriated it to their own use.

It is alleged that pretended notices of mining locations were made and posted on said land and recorded in the office of the Recorder of Kern

County, California, by different groups of locators on the dates respectively:

January, 1907; February, 1910; July, 1910; October 7, 1910; October 18, 1910. (R. 14-15.)

No work of exploration or development for the discovery of petroleum, mineral oil or gas, or any other mineral was ever commenced or prosecuted, in good faith, or otherwise, or at all, upon any part of said land under either or any of said placer mining claims or otherwise by or on behalf of said pretended locators or either or any of them, or any of their alleged successors in interest, or any of the defendants herein, or otherwise, or at all, prior to July 4, 1910. No discovery of any minerals other than petroleum or gas has ever been made on said land; and petroleum or gas was not discovered on said land prior to October 10, 1910. (R. 16.)

Prior to January 1, 1910, no person, or association, or corporation was a bona fide occupant or claimant of any of said land engaged in the diligent or other prosecution of work leading to the discovery of oil or gas, or any other minerals. (R. 17.)

Certain of the defendants, including the defendants Campbell, Jackson and Shrader, appropriated oil from said land to their own use; the quantity of oil so appropriated is not known, and a full discovery in the premises is sought. (R. 17 and 18.)

Certain of the defendants threaten, and unless restrained will continue to operate the oil wells and extract from said land petroleum and gas. (R. 18.)

The bill the complainant seeks discovery of all matters and things stated therein, a full disclosure of the claims of the defendants and each of them; and for a decree declaring that from and after the 27th day of September, 1909, the land was lawfully withdrawn from all forms of settlement, selection, filing, entry or disposal under the mineral and non-mineral land laws of the United States; that the defendants and each of them be decreed to have no estate, right or title, interest or claim in said land or any minerals deposited therein; and that all of the defendants be enjoined from asserting claim thereto, and from going on said land, and from in any manner extracting, removing or using any mineral therein, and committing trespass or waste on said land, and of the minerals deposited therein, and that an accounting may be had by each of the defendants of the minerals taken from said land, and for the recovery of damages sustained by the plaintiff in the premises; and that a receiver may be appointed to take possession of the land and of the wells, derricks, etc. which have been used in extracting, storing, etc. petroleum or gas on said land, and that the receiver have power to continue to operate the said wells for the preservation and protection of the property, and for such other and further relief as in equity may seem just and proper. (R. 24-28.)

The assignment of errors (R. 44-47) seeks to raise

substantially the same questions as defendants sought to raise by the motion to dismiss, which is quoted above. (R. 31-32.)

ARGUMENT.

The eighth assignment of error (R. 46) has no basis in fact, and was probably set out by counsel for appellants by inadvertence and mistake. It is recited in that assignment of error "that a final decree dismissing the bill of complaint herein was entered on the first day of June, 1914." There was no final decree ever entered dismissing the bill of complaint in this suit. The other statements in the eighth assignment of error are predicated upon the erroneous idea that such final decree dismissing the bill of complaint herein was entered. The other assignments of error, seven in number (R. 44-5-6) are more vague and indefinite as to the alleged errors complained of by appellants than was the motion to dismiss. (R. 31 and 32.)

As the brief of the appellants has not been filed, and probably will not be filed in time for counsel for appellee to see it before preparing the brief of the appellee, it is necessary to anticipate the points which the appellants will discuss in their brief and arguments. This can be done with reasonable confidence, however, as the case was fully argued in the District Court.

The appellants, in the motion made by them in the

District Court to dismiss, stated "that the defendants were in diligent prosecution of work, in good faith, leading to the discovery of oil on July 2, 1910, claiming under mineral locations made prior to the 6th day of March, 1910." While this statement does not in all respects accord with the facts alleged, it is, nevertheless, submitted that if it be true, such state of facts will avail appellants nothing. Whether the case is decided upon the allegation that the defendants entered upon the land and began to operate for oil after the 2nd day of July, 1910, or upon the facts as contended by the defendants, that they entered prior to the 2nd day of July, 1910, under a location notice made prior to the 6th day of March, 1910, the results, it is submitted, will be the same.

The appellants in their motion to dismiss say:

> "* * * the basis of plaintiff's cause of action depends on an alleged withdrawal of said lands, described in plaintiff's Bill of Complaint, on the 27th day of September, 1909, by the Honorable, the Secretary of the Interior of the United States, and that the said alleged withdrawal of said land from entry on the 27th day of September, 1909, was unconstitutional, void and of no force and effect, and beyond the authority of the Secretary."

THE CASE OF THE UNITED STATES v. MIDWEST OIL COMPANY, 236 U. S. 459.

The Supreme Court of the United States in an opinion delivered by Mr. Justice Lamar, in the Midwest case, goes fully into the reasons which in-

duced the President to make the order of withdrawal of 27th of September, 1909, and fully sustains and upholds his power in so doing.

The following quotations are made from that decision:

> "Large areas in California were explored; and petroleum having been found, locations were made, not only by the discoverer, but by others on adjoining land. And as the flow through the well on one lot might exhaust the oil under the adjacent land, the interest of each operator was to extract the oil as soon as possible so as to share what would otherwise be taken by the owners of nearby wells.
>
> "The result was that oil was so rapidly extracted that on Sept. 17, 1909, the Director of the Geological Survey made a report to the Secretary of the Interior which, with enclosures, called attention to the fact that, while there was a limited supply of coal on the Pacific Coast and the value of oil as a fuel had been fully demonstrated, yet at the rate at which oil lands in California were being patented by private parties it would 'be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away * * *.' 'In view of the increasing use of fuel by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government's own use * * *' and 'pending the enactment of adequate legislation on this subject, the filing of claims to oil lands in the State of California should be suspended.'

"This recommendation was approved by the Secretary of the Interior. Shortly afterwards he brought the matter to the attention of the President, who, on September 27, 1909, issued the following Proclamation:

" 'Temporary Petroleum Withdrawal No. 5.'

" 'In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after filing, investigation and examination.' "

See pages 1 and 2 of opinion.

The authority of the President to make the order of withdrawal was fully sustained by the Court in the opinion wherein it is said:

"The case has twice been fully argued. Both parties, as well as other persons interested in oil lands similarly affected, have submitted lengthy and elaborate briefs on the single and controlling question as to the validity of the Withdrawal order. * * *

"We need not consider whether as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of legal consequences flowing from a long continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909,

is by no means the first instance in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that the 'practice dates from an early period in the history of the government.' *Grisar* v. *McDowell,* 6 Wall, 381. See also pages 46 et seq. of this brief, which show extent of damage being done by water and otherwise."

THE MIDWEST CASE IS NOT DISTINGUISHABLE FROM THE CASE BEFORE THIS COURT.

Counsel for the appellants insisted in the court below that this case is distinguishable from the Midwest case, in as much as the location notices were posted on the land and filed prior to the order of withdrawal of September 27, 1909, and that it was not sufficiently alleged that assessment work was not done under such location notices during the years previous to 1909. They refer to the recital of facts on page 2 of the opinion in the Midwest case as follows:

> "On March 27, 1910, six months after the publication of the Proclamation, William T. Henshaw and others entered upon a quarter section of this public land in Wyoming so withdrawn. They made explorations, bored a well, discovered oil and thereafter assigned their interest to the appellees, who took possession and extracted large quantities of oil. On May, 1910, they filed a location certificate."

A careful reading of the opinion in the Midwest case will show that no such distinction can be made. The following are quotations from the opinion of the Supreme Court of the United States in that case:

> "Nor is the position of the appellees strengthened by the Act of June 25, 1910 (36 Stat. 847), to authorize the President to make withdrawals of public lands and requiring a list of the same to be filed with Congress.
>
> "It was passed after the President's Proclamation of September 27, 1909, and months after the occupation and attempted location by virtue of which the appellees claim to have acquired a right to the land. This statute expressly provided that it should not 'be construed as a recognition, abridgment or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of this Act.'
>
> "True, as argued, the Act provides that it shall not be construed as an '*abridgment* of asserted rights initiated in oil lands after they had been withdrawn.' But it likewise provides that it shall not be considered as a 'recognition of such rights.' There is however, nothing said indicating the slightest intent to repudiate the withdrawals already made.
>
> "The legislative history of the statute shows that there was no such intent and no purpose to make the Act retroactive or to disaffirm what the agent in charge had already done. The proclamation of September 27, 1909, withdraw-

ing oil lands from private acquisition was of far-reaching consequence both to individuals and to the public. It gave rise to much discussion and the old question as to the authority of the President to make these orders was again raised.

"In other words, if, notwithstanding the withdrawal, any locator had initiated a right which, however, had not been perfected, Congress did not undertake to take away his rights. On the other hand, if the withdrawal order had been legally made under the existing power, it needed no ratification and if a location made after the withdrawal gave the appellees no right, Congress, by this statute, did not legislate against the public and validate what was then an invalid location."

DISCOVERY OF MINERALS IS REQUIRED BEFORE THERE CAN BE A LOCATION OF MINERAL LANDS.

The language last above quoted is unambiguous and makes the Midwest decision applicable to all of the withdrawal cases pending in this Court. The Court should, however, bear in mind that the words "locator" and "location" as used by the Supreme Court refer to cases where discoveries of minerals have been made. A person who has filed a location notice and posted the same on land and has done assessment work, but has not discovered mineral, is not a "locator" and has no "location."

The Supreme Court of California in the case of *McLemore* v. *Express Oil Company,* 158 Cal. 559, considered at length the rights of a prospector who goes upon the public land and engages in work leading to a discovery of oil. It held that no right is acquired by such prospector prior to discovery. The court said:

> "But where the location is incomplete, no question of assessment work is involved. What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry while he is diligently prosecuting his work to a discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view. Of such work, defendant's grantors were not in the prosecution up to April 12, 1907. They were not only in the actual possession of the land, as the Court finds, but the evidence discloses that what they had done was no more than to attempt to hold the land, under the theory that assessment work was adequate for that purpose. It is shown by the evidence that they were not only not engaged in the diligent prosecution of the work, but that they were not financially able to prosecute it, and were either in search of capital to enable them to do so, or in search of purchaser to buy out such interest as it might be thought that they had."

The same court in the case of *Borgwardt* v. *McKittrick Oil Company,* 164 Cal. 150, said:

> "The rights of the person or persons endeavoring to locate an oil claim, after the posting of notice, etc., are well settled by the decisions. Until the inchoate location is perfected by discovery, the locator has no vested right which Congress is obliged to recognize. But where his location is made in good faith, he has the right as against third persons, which is transferable, 'to be protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions, upon his possessions,' so long as 'he remains in possession and with due diligence prosecutes his work toward a discovery.' *Miller* v. *Chrisman,* 140 Cal. 440, 447, (98 Am. St. Rep. 63, 73 Pac. 1084); *Weed* v. *Snook,* 144 Cal. 439, (77 Pac. 1023). As long as such a condition continues, no one without his consent can make the actual entry of the land essential to legally initiate a new location. But actual possession of the land coupled with continued diligent prosecution of discovery work are essential to his protection. What the attempting locator has is the right to *continue* in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery * * *. Clearly, the mere 'figuring' with other persons by the locator as to what they will charge for the doing of such work, or the making of an effort to find some one who will do such work at a price satisfactory to the attempting locator, which is the utmost plaintiffs' evidence tends to show was done, cannot be held to constitute a diligent prosecution of the work of discovery, any more than the pursuit of capital to prosecute such

> work can be held to constitute such diligent prosecution."

The Supreme Court of Nevada, in the case of *The Ophir Silver Mining Company* v. *Carpenter,* 4 Nev. 534, after defining diligence as the "steady application to business of any kind, constant effort to accomplish any undertaking," added:

> "It is the doing of an act, or series of acts, with all practical expedition, with no delay except such as may be incident to the work itself."

In the same case, referring to the contention that illness and lack of means should be taken into consideration in determining the matter of diligence the Court said:

> "But we are inclined to believe that his illness is not a circumstance which can be taken into consideration at all. Like the pecuniary condition of a person it is not one of those matters incident to the enterprise, but rather to the person. The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character."

See also *Federal Statutes Annotated,* Vol. 5, page 10, and notes.

The decisions cited on that page refer, it is true, to discoveries of mineral lodes or veins. It is likewise true, however, that discoveries of minerals are

necessary to give rights to claimants of the public lands under the placer mining law. See *Lindley on Mines,* Vol. 2, Sec. 437.

The following is a quotation from the statute providing for location of placer claims:

> "Claims usually called 'placers,' including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; * * * "

See Sec. 2329 Revised Statutes.

Congress provided that petroleum lands should be acquired under the general placer mining law. There has been no suggestion that a right to a patent, or other rights except such as were conferred by the Act of June 25, 1910, accrued until discovery.

The rules and regulations of the General Land Office with reference to discoveries on placer claims contain the following:

> "But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons."

In *Tuolumne Consolidated Mining Co.* v *Maier,* 134 Cal. 583, the Court held there can be no valid location of a mining claim without an actual dis-

covery of mineral thereon. It further held that, conceding a previous filing without such discovery may become valid by a subsequent discovery of mineral, the land must be treated as government land up to the time of such discovery.

It is clear, therefore, that the Supreme Court of the United States meant, when it used the words "locator" and "location," in the Midwest decision, to embrace a discovery.

It is alleged in the bill of complaint that the defendants had not made a discovery of minerals on the lands in question on the 27th of September, 1909, and further that they were not at that date doing work leading to the discovery of oil or gas, and that they did not for a long time thereafter diligently and continuously prosecute such work; and, therefore, they were not protected either by discovery or by the remedial Act of June 25, 1910, Revised Statutes, Vol. 36, page 846. The defendants filed motions to dismiss based upon the idea that President Taft's order of withdrawal of September 27, 1909, was invalid.

Judge Dooling was of the opinion the President's order of withdrawal was invalid, and had so held in No. 47, a case before him while holding court in the Southern District of California. After the decision in the Midwest case he held the order was valid, and overruled defendants' motions to dismiss, issued injunctions, and appointed a receiver in that case and

in this. Judge Dooling's assignment to deal with these cases expired with the calendar year 1914. Judge Bledsoe delivered an opinion July 12, 1915, in three cases substantially similar to this case, in which he upheld the order of withdrawal and appointed a receiver. Extracts from it are copied in an appendix hereto.

The defendants cannot prevail in this case because the land is affected by the order of withdrawal of September 27, 1909.

THIS SUIT WAS PROPERLY BROUGHT IN A COURT OF EQUITY FOR REASONS AS FOLLOWS:

(a) THE PURPOSE OF THIS SUIT, AMONG OTHERS, IS THE ENFORCEMENT OF A GOVERNMENTAL POLICY.

It should be borne in mind that this is not a suit between private litigants, nor is it a suit, the prime object of which is to *quiet title,* or to *remove a cloud, or to recover possession of land or to recover damages for past trespasses.* It is a suit by the Government of the United States for all these purposes, but these are incidental, and the prime object is a purpose by the United States in its sovereign capacity as the owner and proprietor of the public lands to enjoin and restrain the unlawful actions of the defendants, the effect of which actions will be, unless restrained, a complete destruction of the very

substance of these lands and their contents. It is likewise one of the purposes of the United States to hold, until the final determination of the suit, the oil and gas heretofore produced and which will inevitably and unavoidably be produced hereafter, or the proceeds of the sale thereof. The jurisdiction of the Court on the equity side of the docket is beyond question.

Coosaw Mining Company v. *South Carolina*, 144 U. S. 550.

That case is strictly in point and absolutely determinative of the question in favor of the Government. The suit was brought by the State of South Carolina in one of the State Courts, and subsequently removed to the Circuit Court of the United States. It was a suit in equity to obtain a decree enjoining the mining company, its servants, etc., from claiming any right, title, interest or grant in or to the phosphate rock deposits in Coosaw river in that State, also from taking, mining or removing such rock and deposits in the bed of that river, and from obstructing, by suit or otherwise, any agent or other person acting by authority of the State, from digging, mining and removing the same.

The appellant claimed in its answer to have a contract with the State, by which it acquired an exclusive right for an indefinite period to occupy, dig, mine and remove such rocks and deposits, and that in violation of the constitution the obligation of this

contract has been impaired by a subsequent act of the Legislature.

It will be seen that the facts and principles are identical with those in these withdrawal suits. The property involved was public property. The suit was by the owner of the public property,—the State in that case, the United States in these cases. The object is the same in both cases, namely, to enjoin any claim of right by the defendants, and also to enjoin the defendants from committing acts of waste or trespass upon mineral deposits in the said public land. The defense was the same in principle. In the Coosaw case the defendant claimed there was a previous grant by the State giving it the exclusive right to mine and remove the rock, while in the withdrawal suits the defendants claim that the United States, through the mineral laws, as applicable to oil lands, has given to them the exclusive right to drill wells and extract the oil deposits from said lands. They further claimed until the Midwest case was decided, that the withdrawal order was unconstitutional and inoperative against them, like the claim of the defendant in the Coosaw case, that the subsequent act of the Legislature was unconstitutional in impairing the obligation of their contract. The Supreme Court, in a unanimous opinion written by Justice Harlan, said:

> "It is contended by the appellant that this case is not one of which a court of the United States sitting in equity, could take cognizance, * * *. It is unnecessary, therefore, to inquire

> whether, according to the principles of equity, as recognized in the Courts of the United States, the State can obtain relief by its suit in equity.
>
> "The grounds of equity jurisdiction in such cases as the one before us, are substantially those upon which courts of equity interfere in cases of *waste, public nuisance and purpresture.*"

The Court then cited *United States* v. *Gear,* 3 How. 120, 121, 133, in which the United States, claiming to be the owner of certain lands upon which there was a lead mine, brought an action of trespass *quare clausum fregit* against a party in possession. They also brought a suit in equity for an injunction to stay waste. The Supreme Court held, in the equity case, that digging ore from lead mines upon the public lands, was such waste as entitled the United States to a writ of injunction to restrain it. It will not do to say that the Gear case is distinguishable because the Government had gone into a court of law before bringing the suit in equity. If that were the ground for the decision in the Gear case, it would not have been cited as an authority in the Coosaw case. Again, in the Gear case, the Government had not sued in ejectment,—in fact had brought no action at law to recover possession. It had not settled its title in an action at law prior to bringing the injunction suit. Nor does it appear that the injunction suit was merely ancillary, or to preserve the property during the pendency of the law action. (The only law action brought was merely to recover damages for past trespasses and defendant was in possession claiming title.)

In the Coosaw case the Court then cites *Georgetown* v. *Alexandria Canal Co.,* 12 Pet. 91, quoting therefrom that "it was said to be now settled that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the Attorney General. * * * upon the principle that equity can give more adequate and complete relief than can be obtained at law."

The Court then quotes from *Attorney General* v. *Richard,* 2 Anstr. 603, which was an information in equity, in the name of the Attorney General, to restrain the erection of wharves, and to abate those erected, which was sustained, the Court stating that, "where the King claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it."

The Court then cites *Attorney General* v. *Forbes,* 2 My. & Cr. 123, a proceeding sustaining an information in chancery for the purpose of preventing a public nuisance.

Quoting from *Gibson* v. *Smith,* 2 Atk. 182, in which an injunction was sought to restrain defendant from opening mines upon property held by him under a deed containing reservations against waste, and in which it was objected that the matter was not for a court in equity, it was said:

> "Plaintiff may certainly come into this Court to restrain the defendant from opening the mines, etc., even if he had only threatened to do

> it; nor is it necessary that plaintiff should have waited until the waste was actually committed, where the intention appears, and the defendant even by his answer insists on his right to do it."

The Court then quotes extensively from *Attorney General* v. *Jamaica Pond Aqueduct;* 133 Mass. 361, in which it was held that the great ponds of the State of Massachusetts belong to the public, and like the tide water in navigable streams, are under the control and care of the Commonwealth, and the rights of fishing, boating, bathing, etc., which appertain to the public, are regarded as valuable rights, and entitled to the protection of the Government. It was held in this Massachusetts case, that if a corporation or person is found to be doing acts without right, the necessary effect of which is to destroy or impair these public rights and privileges, it furnishes a proper case for an information by the Attorney General to restrain and prevent the mischief.

The Court in the Coosaw case (p. 567) goes on to state:

> "Mr. Justice Story said that an information in equity at the suit of the Attorney General, would lie in cases of purpresture, and public nuisance, the jurisdiction of the courts of equity being sustained because of 'their ability to give more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation.' Story's Equity Jurisprudence, Secs. 922, 923, 924, and other authorities.

"Those principles are applicable to the present case. *A remedy at law for the protection of the State, in respect to the phosphate rocks, and phosphatic deposits in the beds of its navigable waters, is not so efficacious or complete as a perpetual injunction against interference with its rights, by digging, mining and removing such rocks, and deposits without its consent.* The Coosaw Mining Company unless restrained, will not only appropriate to its own use property held in trust for the public, but will prevent the proper administration of that trust for an indefinite period, by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have, is security for all time against illegal interference with the control by the State of the digging, mining and removing of phosphate rock and phosphatic deposits in the bed of Coosaw river. Such security was properly given by the decree below."

It will be seen from reading the arguments preceding the opinion in the Coosaw case, that all of the points made in the present case against the Court's jurisdiction, were likewise made in that case, namely, that there was an adequate remedy at law, that the complainant was not in possession of the property, and that its right to the property or

possession had not been adjudged. The point was made that "equity will not permit its remedies to be used to turn out one who is in possession, nor to prevent one in possession, claiming title, from reaping the fruits of possession."

(b) PAYMENT OF MONEY BY DEFENDANTS FOR OIL AND GAS WRONGFULLY EXTRACTED WOULD NOT ADEQUATELY COMPENSATE THE COMPLAINANT IN CASES LIKE THESE.

Graves v. *Ashburn,* 215 U. S. 331, was a suit in equity. The petitioners showed title in themselves to land derived from the State of Georgia, which land had upon it pine wood valuable for timber and turpentine. The bill alleged that by breach of trust and fraud, a deed was made purporting to convey to defendants certain portions of the land; that defendants had notice of the want of title, but nevertheless had let the timber privileges to another defendant, and the latter was about to cut the timber, and had already boxed the trees and taken turpentine from them. The bill sought an injunction against boxing trees, carrying away turpentine or cutting the timber, and cancellation of the fraudulent deeds. The Circuit Court dismissed the bill against one of the defendants, on the ground that the plaintiff had a complete remedy at law, and sustained the bill as to another defendant. There were cross appeals to the Circuit Court of Appeals, and that Court concurred with the lower Court, in dis-

missing the bill as to the defendant Crawford, but reversed the lower Court in not dismissing the bill as to defendant Ashburn, holding in this latter regard, "So far as the cloud upon the title was concerned, it did not appear sufficiently from the bill that the *plaintiffs were in possession,* and if they were, the deed to Ashburn did not continue a cloud." As to the cutting of trees, it was held that the remedy at law was complete. The Supreme Court, speaking through Mr. Justice Holmes said:

> "We shall deal first with the last ground of decision which involves a difference of opinion between different Circuit Courts of Appeal. It is assumed, as was found by the Circuit Court, that the plaintiff's title was made out, and that the defendant is or may be responsible for the wrong. *If the defendant is responsible we are of opinion that an injunction ought to issue. The industry concerned is so important to the State of Georgia, and the remedy in damages is of such doubtful adequacy, that equity may properly interpose although under different circumstances an injunction against cutting ordinary timber might be denied. The policy of the State is indicated by Section* 4927 *of the Civil Code,* 1895, continuing earlier acts. 'In all applications * * * to *enjoin the cutting of timber or boxing or otherwise working the same for turpentine purposes, it shall not be necessary to aver or prove insolvency, or that the damages will be irreparable.' Although in form addressed to procedure, this implies a principle grounded upon a view of public policy* (citing Georgia cases). The same result has been reached, apart from statute, by the Circuit

Court of Appeals for the 6th Circuit and in other cases. *Peck* v. *Ayers & Lord Tie Company,* 116 Fed. 273; *United States* v. *Guglard,* 79 Fed. 21; *King* v. *Stewart,* 84 Fed. 546.

"As the case is before us, it is proper to add that we perceive no sufficient reason for denying a cancellation of the deed to Ashburn. The first of these grounds is that plaintiffs did not allege that they are in possession of the land concerned. We infer that the premises or the greater part of them are wood land, and not inclosed by fences, but in their original natural condition. If so, *then possession is a fiction of law,* rather than a possible fact, *and it would be reasonable to assume that possession remains with the title.* (Citing certain cases.) We say more broadly, and without qualifying *Lawson* v. *U. S. Mining Company,* 207 U. S. 1, that in view of the statute, the relief, in case of such lands, should not be made to depend upon shadowy distinctions according to the greater or less extent of the trespasses committed. *Holland* v. *Challon,* 110 U. S. 15; *Simmons Creek Coal Co.* v. *Doran,* 142 U. S. 417-449. It has been intimated by the Georgia court that relief would be granted irrespective of possession. (Georgia cases.) *Sharon* v. *Tucker,* 144 U. S. 533."

(Italics supplied.)

A great deal of stress is laid upon the fact that the public policy of Georgia, as expressed in the statute quoted, was in favor of treating the production of turpentine as a most important industry to the State, so important that as a matter of procedure, neither insolvency nor other irreparable injury, need be proven or alleged, *to entitle plaintiff*

to a preliminary injunction. This point is similar to the point involved in the Coosaw case.

In *Graves* v. *Ashburn,* the statute was merely evidence of the public policy of the State, and the public policy of the State of California is the same with respect to suits to enjoin waste and injury to mines, as was the public policy of Georgia with respect to waste and injury to timber by the taking of turpentine. This is shown by the statement of the Supreme Court of California in the famous case of *Mining Co.* v. *Fremont,* 7 Cal. 317, from which case the following language is quoted and cited with approval by Judge Wellborn in *United States* v. *Guglard,* 79 Fed. 21 (hereinafter referred to), as one of the reasons for sustaining the right of the United States to go into a court of equity in the first instance for an injunction against the cutting of timber on public land and for an accounting for timber already cut. The quotation in the Guglard case from the case of *Mining Co.* v. *Fremont* is as follows:

> "In the case of *Gages* v. *Teague* (Oct. Term, 1857, not reported) this Court held that the mere allegation that the injury was irreparable, would not, in itself, be sufficient, but the complainant must show how. The same is stated as the rule in the case of *Amelung* v. *Seekamp,* 9 Gill. & J. 474. This is, no doubt, the correct rule, the facts must be stated to justify the conclusion of irreparable injury. *But in the case of mines, timber and quarries, the statement of injury is sufficient.* And in the nature of the

case all the party could well state, as a matter of fact, is the destruction of timber in the one case, and the taking away of the minerals in the other."

See also

United States v. *Parrott,* 1 McCall, 271 Fed. Cas. No. 15, at p. 431;

United States v. *Gear,* 3 How. (44 U. S. 120).

In *United States* v. *Guglard,* 79 Fed. 21, it is said:

"Any injury to the inheritance or substance of the estate is irreparable. Growing trees are a part of the land whereon they grow, and their destruction is an injury to the substance of the estate."

The Court in that case, quoting from *Mining Company* v. *Fremont,* 7 Cal., *supra,* said:

"Where a bill shows cause for equitable relief by injunction to prevent destructive and continuous trespass in the nature of waste, the Court, to prevent another suit, will decree an accounting and satisfaction for injuries already done (citing several cases), and when the jurisdiction is thus acquired, the fact that the items of the account are all on the one side, does not affect the rule. In some of the cases cited above, there was no mutuality in the accounts. As already stated, complainant's right to an injunction is sufficient to sustain the jurisdiction of a court of equity, and, in the exercise of such jurisdiction a court will grant all the relief which the circumstances of a case require."

It seems to me it would be illogical to hold that a court of equity had jurisdiction to enforce a public policy of the United States with respect to its public lands, and at the same time hold that an order should not be made enjoining the defendants and appointing a receiver in the present situation. If the action of the defendants complained of in the bills in these cases are purprestures or public nuisances, insolvency need not be alleged or other irreparable damages shown.

In *United States* v. *Brighton Ranch Company,* 26 Fed. 218, it is said by Mr. Justice Brewer, sitting on the Circuit Court bench and speaking for Judge Dundy, as well as for himself:

> "The question made is whether the Government can come into a court of equity and avail itself of the summary remedies given by such a court. We are of the opinion that it can; *and whether the acts of the defendant comes within the technical definition of purpresture or that of a public nuisance we are of opinion that the Government can come into a court of equity, and by its orders have an end put to this trespass on public rights.* * * *
>
> *"We think too, that an action of injunction is the appropriate remedy and that an action of ejectment would not furnish a full protection to the Government.* Generally speaking, any encroachment upon the public domain may be restrained or ended by injunction; and in this case it was not the mere fact that the fence is built upon Government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also

to separate the enclosed lands from the general body of the public domain. So that we think full and adequate remedy can be obtained only in a court of equity, which reaches the individual and compels him to abandon and desist from any encroachment on the public property."

See also

United States v. *Parrott,* 1 McCall, 271 Fed. Cas. 15998, 7 Morr. Min. Rep.

(c) MULTIPLICITY OF SUITS AVOIDED.

The court of equity will entertain jurisdiction for the reason, among others, that if it does not do so a multiplicity of suits would be required, instead of the one case now before the Court.

See

Pomeroy's Equity Jurisprudence, 3rd Ed. Vol. 1, p. 356, et seq.; also Sec. 274;
Sharon v. *Tucker,* 144 U. S. 533;
Preteca, et al. v. *Maxwell Land Grant Company,* 50 Fed. 674;
Bailey v. *Tillinghast,* 99 Fed. 801;
De Forest v. *Thompson,* 40 Fed. 375;
Osborne v. *Railroad,* 43 Fed. 824;
Sang Lung v. *Jackson, Collector,* 85 Fed. 502;
Boyd, et al. v. *Schneider,* 131 Fed. 223;
Bitterman v. *L. & N. R. R.,* 207 U. S. at 226;
Dodge v. *Bridge,* 27 Fed. 161.

See also the two leading English cases generally known as:

"The Case of the Fisheries";
Mayor of New York v. *Pilkington,* 1 Atk. 282, and
"The Case of the Duties";
City of London v. *Perkins,* 3 Brown Parl. C., Tomlin's Ed. 602.

(d) POSSESSION OF THE COMPLAINANT NOT NECESSARY TO SUSTAIN JURISDICTION OF A COURT OF EQUITY.

The main object of the bills in these cases is to restrain the continuous trespass and waste of the oil and gas, the very substance of the land,—in fact the only things that give the land any value. In this situation equity will take jurisdiction and settle all questions involved, including the question of right to possession.

See

Peck v. *Ayers & Lord Tie Co.* (C. C. A. 6th Cir.);
Burt v. *Cumberland Coal Co.,* 159 Fed. 905 (C. C. A. 6th Cir., Lurton, Judge);
Oolagah Coal Co. v. *McCaleb,* 68 Fed. 86 (C. C. A. 8th Cir.);
Big Six Dev. Co. v. *Mitchell,* 138 Fed. 279 (C. C. A. 8th Cir.);
Story's Eq. Jur., Sec. 840.

It cannot be said that the United States must be in the possession of the land in the sense of having

some officer or agent of the United States in actual possession. The public lands of the United States are so extended that this would be impossible, and furthermore, much of the public land of the United States is of a character that cannot actually be occupied until it is developed. Much of it is timber land; much of it is desert land, and other of it is swamp land, etc.

It is said in the case of *Graves* v. *Ashburn, supra,* 215 U. S.:

> "We infer that the premises, or the greater part of them are wood land, and not inclosed by fences, but in their original natural condition. If so, then possession is *a fiction of law, rather than a possible fact,* and it would be reasonable to assume that possession remains with the title." (Italics supplied.)

There are stronger reasons for applying this doctrine in the cases now before the Court. The bill of complaint, verified and used as an affidavit, alleges damage not only on account of the extraction of oil and gas from the lands, but on account of the infiltration of water into the oil sands. The extent of this damage is great, and there is no fixed standard by which to measure the pecuniary injury, and in such cases, the law is that it is irreparable.

THE RIGHTS OF THE GOVERNMENT AS A SUITOR IN COURT.

Much was said in the District Court to the effect that when the Government comes into court it has

no greater right than an individual. Generally speaking, this is true, but it is often misapplied. The Government in a suit to enforce a governmental policy can enforce rights which an individual does not possess. No individual acts for the public, and often the Government does. The distinction is illustrated by what the Supreme Court of the United States said in *United States* v. *Trinidad Coal Company,* 137 U. S. 160. That was a suit in equity brought by the United States to set aside certain patents conveying coal lands on the ground of fraud. The cause of action, in general, was that the Trinidad Coal Company had entered into a conspiracy with a number of individuals by which they fraudulently represented to the Land Department that they were acting in their own rights, and procured patents to a large amount of lands on an agreement to thereafter convey them to the Trinidad Coal Company, thus enabling it to obtain title to more land than was allowed. The Court said:

> "It is contended by the defendant that the United States is subject, as a suitor, to the same rules that control courts of equity, when determining, as between private parties, whether particular relief should be granted; that the Government, asking equity, must do equity, and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to could not be enforced in a case like the present one. In the matter of disposing of the vacant coal lands of

the United States, the Government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain a title to such lands, had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people, and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but in the discharge of a higher public duty, and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. *The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions.* It is not disputed that the Attorney General may, in virtue of the authority vested in him, institute this suit. According to the allegations of the bill, which are admitted to be true, the defendant is a wrongdoer against whom the Government seeks to vindicate its policy in reference to the development of its vacant coal lands."

(Italics supplied.)

The Court then goes on to state that if defendant is entitled to a return of the money paid by it upon obtaining the patents, then it must be assumed that Congress will make an appropriation for that purpose when necessary.

"The proposition that the defendant, having violated the public statute in obtaining public

lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title, is not within the reason of the ordinary rule that one who seeks equity must do equity, and, if sustained, would interfere with the prompt and efficient administration of the public domain."

In *United States* v. *Verdier,* 164 U. S. 213, at page 219, it is said:

"An inherent vice of petitioner's argument is in the assumption that he and the Government stand upon an equity with respect of interest. The truth is that in its dealings with individuals public policy demands that the Government should occupy an apparently favored position. It may sue, but except by its own consent, cannot be sued. In the matter of costs, it recovers but does not pay, and the liability of the individual would not be affected by the fact that he had a judgment against the Government which did not carry costs. So, the statute of limitations may be pleaded by the Government, but not against it nor is it affected by the laches of its officers. * * *

"Under the bankruptcy law, it was a preferred creditor, and its claims were paid even before the wages of operatives, clerks, or house servants. *Rev. Stats.* 5101. *In short, the equities which arise as between individuals have but a limited application as between the Government and a citizen.*"

IS THERE ANY MERIT IN THE POSITION OF THOSE ON THE WITHDRAWN GOVERNMENT LANDS, THAT IT WOULD BE UNFAIR TO TAKE THE LANDS AWAY FROM OPERATORS?

It was insisted in the lower Court that:

> "The Government is acting harshly, inequitably, and in bad faith. It is relying on legal technicalities to secure an unfair advantage. The great maxim that he 'who seeks equity must do equity' is totally ignored in the Government's case.' "

When the President entered his order of withdrawal of September 27, 1909, Congress might have made it indictable for any person to enter upon or remain upon land in which there were no vested rights acquired, and thus protect these public lands, but Congress proceeded upon the assumption that respect would be paid to the President's order of withdrawal, and that it would not be violated, and that only those who had acquired some vested rights would take oil from unpatented land. Under the allegations in the bill in this case the defendants were in possession of the public domain upon a mere gamble that the President's order of withdrawal of September 27, 1909, was illegal. It is not denied that the entry upon the public lands by the defendants in these cases was in violation of this first order of withdrawal. The Government did not induce the defendants to think that the order of withdrawal was invalid. It did everything it could to

secure respect for and obedience of it. The President issued the order of withdrawal and thereby indicated it was his opinion he had the power to do so, but he recognized that the ultimate determination of the question of his power rested with the courts. Those who entered upon the lands in the face of this order of withdrawal were daring in their speculation and risky with their wagers; and as now when the courts hold that the order of withdrawal was valid and that they were trespassers from the beginning, and violators of the law, as well as disrespectful to the Chief Executive of the United States, there certainly is no basis upon which they can found a plea that they have acquired equities superior to those who, impelled either by timidity or by respect for the order of the President, remained out of possession of the land, or being in possession on September 27, 1909, surrendered their possession. The defendants forget that the primary position of the Government is to conserve the oil in the ground for governmental uses and purposes, until Congress shall determine what shall be done in the way of further legislation. These defendants, and all those who are similarly situated, seem to be seriously impressed with the idea that by violating the Government's policy and by destroying the corpus of the property, not only by the extraction of oil from the ground, but by creating a condition whereby it is impracticable to cease to withdraw it, and by letting large quantities of water into the oil sands and thus rendering useless and of no com-

mercial value that portion of the oil which the defendants and those similarly situated have not been able to extract, they have acquired equities as against the Government. They seem to be serious when they urge that notwithstanding they may have expended money in providing an equipment for pumping oil and left to be pumped with that equipment an emulsion of water and oil, or only of water, that nevertheless the Government ought to give them credit for the cost of the equipment, and that it would be inequitable not to do so.

To state the proposition plainly is to answer it. If the President's order of withdrawal of the 27th of September had been invalid, these defendants would have acquired title to the land as against the Government and as against every other citizen of the United States. In that event they would not have been dependent upon the recognition by the Government of equities which they claim to possess, but their legal title would have been all-sufficient, and they would have acquired by their operations, it is conceded for the purposes of this argument, the legal title to the land. If, on the other hand, they have with disrespect to the President of the United States, and in violation of a legal order of withdrawal, injured the public domain, contributed to the difficulties of the Government's executing its public policy with respect to petroleum on the public lands, and rendered difficult the problem of utilizing the Government's oil for the Government's Navy, they are in no position to receive what they call

equitable treatment at the hands of the Government by asserting in court that "the Government is acting harshly, inequitably, and in bad faith."

It is amazing if the defendants have not seen the want of logic in their contention, but from the insistence with which their counsel present their views, and their apparent earnestness of language and of manner, I am persuaded that perhaps they have not seen it.

Though the case of *United States* v. *Midwest Oil Company,* decided February 23rd, sustained the order of the President withdrawing these lands, the occupants have as strenuously resisted the efforts of the complainant to protect the lands from damage by trespass as before that case was decided, and are still resisting the efforts of the United States to deal with these lands.

CONSTRUCTION OF THE PICKETT ACT (36 STAT. 847) AND CONSIDERATION OF THE RELIEF AFFORDED BY THAT ACT.

The Act, by Section 1 expressly authorized the President, in his discretion, temporarily to withdraw from settlement, etc., any of the public lands of the United States, for public purposes. Section 2 provided that lands so withdrawn shall be open to exploration, discovery, occupation and purchase under the mining laws of the United States, other than coal, oil, gas and phosphates. The proviso to

Section 2 of the Pickett Act was for the relief of certain persons occupying such lands in the manner therein defined at the time of such order of withdrawal. The language of that proviso is as follows:

> "*Provided,* That the rights of any person who, at the date of any order or withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work."

The entire Act is copied as an appendix hereto. The bill of complaint and the motion of the defendants to dismiss negative the idea that the appellants were, on the 27th day of September, 1909, in *diligent prosecution of work leading to the discovery of oil or gas,* and that they continued in the diligent prosecution of such work.

It is not sufficient that they were on such date and were thereafter "occupants or claimants" of the land. The discovery of minerals was a condition precedent to the acquisition of any vested right to mineral land of the United States prior to the Act of June 25, 1910, as against the United States. That Act afforded relief to certain persons claiming "oil or gas bearing lands."

The relief, however, was extended to those who at the date of an order of withdrawal were

(a) Bona fide occupants or claimants; and

(b) Who were at such date in diligent prosecution of work leading to discovery of oil or gas, "so long as" such persons "continued in the diligent prosecution of said work."

In considering remedial legislative acts it is proper to inquire into the conditions sought to be remedied. In the case of *United States* v. *Midwest Oil Company* the Court took judicial notice of all public documents. That this may be done is the settled rule of law.

On May 13 and 17, 1910, there were public hearings before the Committee on Public Lands of the House of Representatives. The proceedings before the Committee were reported to the House, and the report, together with the proceedings, has been published. (H. R. 24070.)

The Pickett Act (36 Stat. 847) was responsive to the requests of the representatives of the Committee of the California oil operators who appeared before the House Committee, and stated the grievances of those, whom it was represented had sustained undue hardship by reason of the order of withdrawal of September 27, 1909.

I quote from the published hearings before the House Committee (H. R. 24070) as follows:

> "Mr. Smith: [a member of Congress and a member of the Public Lands Committee]. I

understand that Mr. Weil of San Francisco will make some preliminary statements, and then he will call on others, according to an understanding that they have, in relation to the different features of the subject."

On page 4 of the published hearings appears the following:

"Mr. Weil. Mr. Chairman and gentlemen of the committee: Day before yesterday the Senate Committee on Public Lands gave us an opportunity to present certain facts in relation to the conditions in the oil fields in California. I understand that there is a strong possibility of any bill that is passed by the Senate, or which may be passed by the House, going into conference between this committee and the Senate Committee on Public Lands. With the permission of this committee I will present the same facts to it, so that it may be equally advised with the Senate Committee as to the situation.

"The line of facts that we presented to the Senate Committee was as follows: We desired to show to the Senate Committee, by statements and maps, that the bulk of the land which is sought to be withdrawn is already in private ownership. Furthermore, we desired to present to the committee the geological situation in those fields, in the entire oil section and oil belt of California. We also desired to show the hardships which will be imposed upon many operators who have been proceeding in good faith under existing laws.

"Mr. Thomas O'Donnell, of the city of Los Angeles, is one of the oldest operators in the field—that is, not in point of years but in

point of experience. He is one of our pioneers there, and is thoroughly familiar with all the facts. He has caused a series of maps to be prepared, for the accuracy of which we can vouch. We desire to present these maps first to you, gentlemen, in order to show you how the lands are held in the California oil fields."

It appears from the published hearings that Mr. O'Donnell, referred to by Mr. Weil, was chairman of the delegation which appeared before the House Committee. The following are extracts from the statement of Mr. O'Donnell, as appear in the published hearings referred to:

"It has been decided by all of the courts in the United States that in order to comply with the terms of that law it was necessary for the petroleum miner also to make a discovery on the piece of land on which he was located. The placer miner, looking for gold, could go along with a shovel and turn over a little gravel and get a color of gold, and he had then made the necessary discovery. But our petroleum in California is in many instances 4,000 feet under the earth; and it is being developed successfully today from that depth.

"You gentlemen can readily see the absolute necessity for the oil miner to go upon this land and proceed to make that discovery. In many instances, gentlemen, with the difficulties that have risen in this development, it has taken years to find out whether a piece of land was really oil land or not and to make the discovery which is necessary before you can make application to the Land Department and acquire title to the land." (Page 5.)

"Mr. O'Donnell. The danger exists just the same, because the President has already withdrawn a great many of these lands; and it is our belief that the law is such that the withdrawal of these lands will prevent the acquisition of title to them. We believe that this measure was passed in a way for the purpose of conserving the resources of the nation, so that the government lands should not be wasted, and for various other reasons which you gentlemen are more familiar with than I am." (Page 5.)

. . . . . .

"Mr. O'Donnell. * * * Many controversies have been brought about in regard to these lands by people locating large quantities of them and not doing anything with them. But the courts have corrected that; and if the law were specific and definite enough, as interpreted by the ruling that the courts have made, in my judgment the present law would be sufficient. But we do admit that to that extent the law should be amended." (Page 6.)

Mr. Weil interjected the following remarks while Mr. O'Donnell had the floor before the committee:

"Mr. Weil. The effect of that decision was this, Mr. Chairman: Under the placer mining laws the placer miner has no rights between the time of location and the time of discovery. But where a man has located a piece of placer mining ground—for oil, for instance—and it takes him two or three years to validate his location by making a discovery, the courts have held that during that period of time, so long as he is operating in good faith and attempting to make a discovery on the land, no one else

can initiate a valid location against him by clandestine or surreptitious entry.

"Mr. Robinson. What cases have held that?

"Mr. Weil. One of them is the case of *Miller* v. *Chrisman* (140 California).

"The Chairman. Was that as between two mineral claimants?

"Mr. Weil. Yes, sir; not as against the Government. The difficulty here is that we concede that we have no rights against the Government until we have made a discovery." (Page 6.)

"Mr. O'Donnell. What I want to get at is this: The placer mining laws, as they have applied to California development, have been good. The decisions of all of the courts have been good. There have been attempts to abuse the law. Whole counties have been located under the so-called rights that the locators would have under the placer mining law. But in no case has such a claimant succeeded in obtaining patent for those lands from the Government, because the courts have ruled that anybody had a right to go upon them. When they were in legitimate pursuit of discovery they were seldom disturbed. The fact that it was necessary to drill an oil well on every 160 acres and get an oil well before you could hold it has tended toward the development of the Pacific coast to the extent that it is now developed." (Page 9.)

. . . . . .

"Mr. O'Donnell. * * * If the placer mining laws as they stand today could definitely establish what is the legitimate pursuit of discovery, they would be sufficient. I do not believe in disturbing a man when he commences to drill a well. I do not believe it does the poor man

or anybody else any good to permit him to go and take 40 acres or 80 acres or 100 acres, and sit down on it and not do anything with it. It does not do him any good, nor does it do the industry any good." (Page 10.)

. . . . . .

"Mr. Pickett. The Pickett bill provides two things: First, it confers authority upon the President to withdraw public lands in certain cases. Secondly, it confirms the authority heretofore exercised.

"Mr. O'Donnell. Yes.

"Mr. Pickett. You said a moment ago that if this bill became a law it would destroy the rights of one-half of the oil companies in this Coalinga field.

"Mr. O'Donnell. Yes.

"Mr. Pickett. Will you please explain to the committee, so that it will go into the record, how that will be done? Get down to the proposition that is in issue here.

"Mr. O'Donnell. The proposition is that we believe that we have no rights as against the Government until discovery has been made; that in all of these instances no discovery has yet been made; although millions of dollars in the aggregate have been expended; that there has been a disposition (perhaps not intentional) on the part of the department to withdraw all of our public lands out there; and that the Secretary of the Interior has already withdrawn many of these lands." (Page 15.)

. . . . . .

"Mr. Lacey. * * * The Pickett bill in express terms ratifies every withdrawal heretofore made. Some of these men have discovered or are about to discover oil that they have been after for two years; in some cases they have

discovered it since the withdrawal; but the bill does not protect them.

"That is the situation from the legal standpoint.

"Mr. Pickett. Then as I get the thought as you present it, Mr. Lacey, it is this: The particular feature of the bill to which they object is the ratifying clause?

"Mr. Lacey. Not only that, but it is a retroactive clause in one sense of the word.

"Mr. Lacey. One or two very simple amendments should be made in the Pickett bill that would protect the moral rights of these men, if that bill is to protect those men who have initiated locations and gone on and spent their money." (Page 16.)

. . . . . .

"Mr. Pickett. I assume from the statements here that the objection to that is based upon the theory that they have already expended money, and so forth, and acquired what they consider to be valuable rights. That being the case, I, for one, as a member of the committee, would like to have them direct their attention to the facts material to that issue.

"Mr. Lacey. That is what Mr. O'Donnell desires to do; and if he is permitted I think he can make it clear.

"Mr. Pickett. And whether the money had been expended prior to the withdrawal, or whether they went in subsequent to the withdrawal with a view of gambling upon what would be the final adjudication of the legal rights." (Page 17.)

. . . . . .

"The Chairman. The withdrawals, then, have gone far beyond any proven territory?

"Mr. O'Donnell. Oh, my, yes! This is what

is known as the 'South Coalinga field,' and is an extension of the first map (producing a second map, which was later marked 'No. 2'). In that distance there has perhaps been expended in the last year over $1,000,000 in pursuit of discovery where no discovery has yet been made. They have been operating more or less in there for the last ten years; but during the last two years the development has been stimulated by success at other places. Everybody in that district that is on government land would lose his rights, in our judgment, if the bill were allowed to stand in its present form." (Pages 17 and 18.)

. . . . . .

"Mr. O'Donnell. * * * In the drilling of those wells, which in some instances it has taken them two years to drill, we use heavy iron pipe. The formations there are soft; and we have to keep moving that pipe up and down from the time some of those wells are started for one solid year. They never stop; they work night and day. There are instances where, in order to keep your hole large enough and prevent the necessity of putting in five or six thousand dollars' worth more casing, it is necessary to keep that casing moving, in some instances every hour, to prevent the formation collapsing against it and adhering to it. There is no time after you start on a wild-cat well when you can suspend operations without serious results, and the probable loss of your entire investment.

"Now the Government comes along and withdraws these lands. It does not recognize that we have any rights; and we have either got to go ahead with this work or admit right there that we never can get it." (Page 18.)

. . . . . .

"Mr. O'Donnell. There is a considerable

portion of it that is located; but the workings of the placer-mining law will take effect, perhaps, in that country after discovery. Men can not hold, under the rulings, any more of that land than they are drilling a well on—160 acres. There has been for the last twenty years in California, as I told you, this sort of thing about a fellow going out on the 1st of January, with the idea that he was getting something, and locating these lands, never making any pretense of doing anything with them, you know. First the idea was that you were jumping somebody's land when you went on land that was located; but that has practically been eliminated, and it has operated for the benefit of the oil industry.

"The Chairman. One more question. Have you any approximate data as to the number of 160-acre tracts upon which work was undertaken before withdrawal, where discoveries have not been made?

"Mr. O'Donnell. With just my personal knowledge of the development of the field, I could perhaps take the maps and in a couple of days get that for you. I had not considered that necessary; I had not thought of it. I can see that it would have a bearing all right. * * *" (Page 19.)

. . . . . .

"Mr. Weil. In response to Mr. Pickett's question, you said that the reason the work was continued on these lands was that it was generally believed the withdrawal order was invalid. Is it not a fact that in order to preserve the value of the workings, it was necessary to keep right on, in order to keep the casing loose in the wells?

"Mr. O'Donnell. That is the general condition; yes.

"Mr. Smith. Let us suppose that you ceased working as soon as you heard of the withdrawal. What would have been the effect on the wells?"

"Mr. O'Donnell. I might just as well have quit individually. That is what I probably would have done.

"Mr. Smith. Could you reopen them at all?

"Mr. O'Donnell. No. Where my greatest personal interest is concerned, I would have been unable, perhaps, to have continued at all." (Page 42.)

. . . . . .

"Mr. Pickett. I should like to ask this question of some one of these gentlemen here who is authorized to speak for the California delegation present. How much or how little (whichever way you want to put it) do you think a man should do upon one of these locations in order to come within the protection of the law?

"Mr. Ewing. Let Mr. O'Donnell answer that. He is the most practical oil man present.

"Mr. Pickett. That brings it down to the point in issue.

"Mr. O'Donnell. Gentlemen, I do not believe we want to claim anything from the Government of the United States out there except on those lands where there is an actual pursuit of discovery. It is hard to determine just where the pursuit of discovery commences; but it has got to be legitimate and continuous. That is the line of all of the decisions in all of the cases we have had in California, when a contest has been raised over these lands. The question has been whether a man was continuously working to the end of making a discovery; whether he was building a pipe line to the land, getting his houses ready, providing his material, haul-

ing his machinery on, or whatever it might be —in other words, whether he was legitimately trying to drill a well upon that territory and make his discovery.

"I do not believe any of us want to tie up these government lands and hold them for indefinite periods by making some pretense of putting up a derrick or putting up a cabin, or anything of that kind. As a practical man, knowing nothing about law, I should say that if a provision is inserted in this bill following out the line of those decisions and the practice that they have led to, I believe it will protect the interests of those that are expending money in an effort to make these discoveries, and that any pretense to that end will not acquire these lands.

"Mr. Smith. Let me ask you about this a little more specifically, because I am anxious to get further information for my own enlightenment. Conditions have changed a little since I had some intimate knowledge of oil development in California five years ago. Suppose we pass the bill as it is now proposed to be amended, and the President, on the 20th day of June, issues his order that 'All the vacant and unoccupied lands in townships 29 and 24,' say, 'are hereby withdrawn from location and entry.' Then the question will arise, 'Was a given piece of land vacant and unoccupied on the 20th day of June?' Now, what will constitute the minimum proof that will be necessary? Of course we can understand the maximum. What would constitute, in your mind, the minimum amount of effort on, we will say, the northwest quarter of section 20, to show that it was occupied before the 20th day of June? I think that is the concrete case that is presented to us.

"Mr. Ewing. Will you permit just a suggestion, Mr. Smith? The question you have asked us is a judicial question. In my judgment, you constitute a legislative body. When you say, 'vacant and unoccupied,' you are no longer interested in what the courts may determine those words to mean.

"Mr. Volstead. I think we are.

"Mr. Smith. Oh, yes; we are.

"Mr. Pickett. I want to say to you that I am very much interested in knowing what the courts are going to say about that before I vote for the legislation. That is the very purpose of this inquiry." (Page 73.)

After these hearings and upon these representations, Congress passed the Pickett Act of June 25, 1910. There was a proviso in it, as follows:

"*Provided,* That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work."

It appears, therefore, that about eight months after the withdrawal order of September 27, 1909, a delegation of oil operators, acting for themselves and representing others, made known to Congress just what remedial legislation was required to meet the so-called equities of operators, and Congress responded by giving substantially the relief asked

for. Any rights which the defendants in these cases have under the remedial legislation of the 25th of June, 1910, are being exercised without challenge by the complainant.

Notwithstanding all this, the defendants now assert that the action of the Government in bringing these suits against those who are not protected by the Act of June 25, 1910, is "harsh, inequitable, and in bad faith."

It is now asserted that the withdrawal order of the 27th of September, 1909, was generally thought to be void. It is evident, from what was said before the Public Lands Committee of the House, that there was at that time belief by some and strong suspicion in the minds of all the interested parties that the withdrawal order would be held to be valid.

The decision by the Supreme Court of the United States in the Midwest case, that the withdrawal order of September 27, 1909, was valid, settles that question in favor of the complainant; and those who violated that order of withdrawal and are not protected by the Act of June 25, 1910, have no just cause for complaint that the Government protests against their further trespass upon the public domain.

It may be there are a larger number of people in California and Wyoming who ceased to trespass on the land, out of respect for the President's order

of withdrawal of September 27, 1909, than there are those who disregarded it. These, and the public generally, are entitled to more consideration than those who have entered upon the land after the order of withdrawal, or who have otherwise violated its terms, and are not protected by the Pickett Act.

It now becomes material to inquire just what benefits were conferred by the Pickett Act on those who had not discovered oil on the 27th day of September, 1909, but who were bona fide occupants or claimants and were in diligent prosecution of work leading to the discovery of oil or gas, and who have since found oil or gas in the withdrawn lands. In other words, it is material now to inquire what is meant by the first proviso of Section 2 of that Act which says that such persons so claiming and so operating shall not be disturbed in their rights "*so long as* such occupant or claimant shall *continue* in diligent prosecution of said work." It will be noted that there is no provision for the patenting of the lands upon which such work is being done, unless oil had been discovered prior to the withdrawal.

If oil had been discovered prior to the 27th day of September, 1909, as provided by the Act of February 11, 1897, so as to show that the land was more valuable for petroleum than for any other purpose, the person so making the discovery would have had the right to a patent, and such person would not need to invoke

the protection of the Pickett Act. In the absence of such a discovery no rights to the lands existed.

Who is it then who is referred to in the first part of the proviso of the Pickett Act, above quoted, in the following language:

> "* * * that the rights of any person at the date of any order of withdrawal heretofore made * * * shall not be affected or impaired * * *"?

The answer to this question may be found in Section 2319, Revised Statutes, which provides for the right to *explore* for and *purchase minerals,* as distinguished from the right to occupy and purchase the land in which the minerals are found. The Pickett Act does not provide that a person who is in possession of land, pursuing work leading to the discovery of oil, when the land is withdrawn, acquires title to the land when petroleum subsequently is discovered. It merely provides that the rights—which, it is insisted, embrace only the rights of an explorer for minerals—shall not be affected *so long* as such occupant or claimant shall *continue in diligent prosecution* of said work.

It would seem to follow, therefore, that the persons protected by the Pickett Act are those who were in prosecution of work leading to the discovery of oil on the 27th of September, 1909; and that the time during which they were so protected is the time of the continuation of such work. In no event, however, are rights conferred upon anyone who was not, on the

27th day of September, 1909, in the diligent prosecution of work leading to the discovery of oil, and who did not diligently continue the prosecution of such work.

Respectfully submitted,

T. W. GREGORY,
Attorney General.

E. J. JUSTICE,
Special Assistant to the Attorney General.

October 23, 1915.

APPENDIX.

OPINION OF U. S. DISTRICT JUDGE

United States of America, *Plaintiff,* vs. George W. McCutcheon, Obispo Oil Co., et al., *Defendants.*	Equity Suit No. A-12
United States of America, *Plaintiff,* vs. David Kinsey, Midway Field Oil Co., et al., *Defendants.*	Equity Suit No. A-13
United States of America, *Plaintiff,* vs. Midland Oilfields Co., Ltd., *Defendants.*	Equity Suit No. A-30

Application is made in each of the above entitled cases for the issuance of an injunction in the nature of a restrain of waste, and for the appointment of a receiver to take charge of and operate the oil wells situate upon the properties in controversy. Substantially the same state of facts is presented in each case, and the legal questions presented for determination are essentially similar. All are suits to quiet the title of the government in and to certain oil lands in this State now in the possession of and claimed under oil land locations by the respective

defendants. The basis of the government's claim in this behalf is that the lands were withdrawn from entry and location by the government and that in consequence the entry of the respective defendants thereon has served in no wise to give them any rights as against the Government.

It will be remembered in this connection that on September 27, 1909, the President of the United States issued his much discussed withdrawal order, temporarily withdrawing from all forms of location, settlement, etc., certain specified public lands, including those in controversy herein, then belonging to the United States government; and, although the validity of this order was challenged at every step by those interested in the oil industry, it successfully withstood every attack and was finally and definitely upheld in its every aspect by the Supreme Court of the United States, in *United States* v. *The Midwest Oil Company,* decided February 23rd, 1915. All of the lands involved in these cases were included within the terms of the withdrawal order.

In the Kinsey and Midland Oilfields Company cases the facts as alleged in the verified bills are *comparatively* simple. In the Kinsey case it is alleged that the plaintiff, the United States government, now is, and at all the times mentioned and ever since the Treaty of Guadaloupe Hidalgo has been the owner and entitled to the immediate and exclusive possession and enjoyment of all of the lands described in the bill, and particularly all of the oil, petroleum, gas and other mineral therein contained. That at all times mentioned all such lands have been and now are part of the public domain, except as withdrawn and reserved from entry as is hereinafter alleged. That said lands now are and at all times have been oil and gas bearing

lands, containing rich deposits of petroleum or mineral oil and gas in commercially paying quantities, and at all times said lands have been and now are chiefly valuable for the petroleum or mineral oil deposits therein.

It is then alleged that on the fourteenth day of September, 1908, the Secretary of the Interior duly and regularly withdrew and reserved the said lands from settlement, entry or purchase, under the agricultural land laws of the United States, for the purpose of examining and classifying them. On June 9th, 1909, the said lands were duly and regularly classified by the said Secretary, as petroleum or oil bearing lands. On September 27th, 1909, the President of the United States, under authority legally invested in him so to do, duly and regularly withdrew and reserved all of said lands by the withdrawal order hereinabove referred to. On July 2nd, 1910, the President under the authority specially invested in him by virtue of the provisions of the Act of Congress approved June 10th, 1910 (36 Stats. 847), duly and regularly ratified, and continued in full force and effect his order of withdrawal of September 27th, 1909, aforesaid, and did further withdraw and reserve all of such lands from mineral exploration, occupation, and from all forms of location, settlement, application, selection, etc., under the mineral or non-mineral public land laws of the United States. That both of said orders of withdrawal and reservation have ever since their respective dates been, and now are, in full force and effect.

It is next alleged that there was no petroleum or other mineral produced or discovered on said lands until long after July 10th, 1910, but it was first produced thereon on or after March 15th, 1912, by the Midway Field Oil Company, one of the

defendants named, and that there was no other production by any of the defendants, or any other person, of petroleum or mineral oil or gas, or other mineral, on said premises, until long subsequent to March 15th, 1912. Several placer mineral locations upon said land are then specifically referred to, but speaking of them in gross, it may be said that all of them that were made prior to September 27th, 1909, were abandoned by their respective locators, and that none of the locators thereof ever made any discovery on said lands.

It is alleged that on June 8th, 1910, the "Blue Feather" mineral location was made on said land, and that on June 9th, 1910, the "Midway Mine" location was made thereon.

It is also alleged that subsequent to the second day of July, 1910, the United Midway Oil Land Company, claiming under and through the said "Midway Mine" location, entered upon said property, and that, thereafter, the Midway Field Oil Company, as its lessee, entered upon said property under and by virtue of said "Midway Mine" location, and after drilling a well upon said claim, made a discovery of oil thereon, and proceeded to and are now extracting from said land large quantities of petroleum and mineral oil.

It is also alleged the Union Oil Company of California, the only other operator upon said claim, entered thereon subsequent to the second day of July, 1910, and made a discovery thereon, and effected a subsequent production of oil therefrom.

It is then alleged that no discovery of oil or petroleum upon said premises has ever been made upon any part of said land except as is hereinabove set out; that no valid location or entry of, or claim

to, said land under the public land laws, or otherwise, was ever made by defendants or either of them; and that, on the 27th day of September, 1909, there was no locator or person in occupancy of the said claim, as claimant or otherwise, and that, on the 2nd day of July, 1910, there was no person or corporation in diligent prosecution of work leading to the discovery of oil or gas on said lands under any location or pretended location, or otherwise.

It is then alleged in apt language that the defendants have no rights upon said lands; that they are trespassers thereon, and are extracting oil and gas therefrom without right, and to the irreparable injury of the proprietary rights of the plaintiff in and to the said property.

It is also alleged that the value of the lands referred to exceeds one million dollars.

In the Midland Oilfields Company case, the bill of complaint in which was filed March 30th of this year, with reference to the particular matters in controversy, it is alleged that the President made the withdrawal order of September 27th, 1909, hereinabove referred to including the lands in controversy in the suit, and that notwithstanding such order, and in violation of the proprietary right of the plaintiff, and of the lawful orders and proclamations of the President, and particularly in violation of the aforesaid withdrawal order, the defendants named, entered upon the premises in controversy long subsequent to the said 27th day of September, 1909, but that some time after the year 1910, one of the defendants discovered petroleum on said lands, has since produced and caused to be produced large quantities thereof, and threatens to continue the extraction and sale of the same.

It is then alleged that none of the defendants or any other person was bona fide occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas on September 27th, 1909.

It is alleged that the value of the lands in controversy in this suit exceeds five hundred thousand dollars.

General allegations are made in all the complaints that the defendants in possession and engaged in producing oil from the respective properties, involved, are actually extracting oil therefrom in large quantities, and converting the same to their own use; that defendants threaten to continue so to operate said properties and otherwise commit waste and trespass upon the lands of right belonging to plaintiff, to its irreparable injury and in violation of its settled policies with respect to the conservation of its petroleum deposits.

It will be observed that in both of the cases last hereinabove referred to, the initiation of the rights of the defendants upon the lands in controversy occurred subsequent to the date of the Presidential withdrawal order of September 27th, 1909.

. . . . . .

Referring to the facts pleaded as affecting defendants' rights under the withdrawal order, it may be stated generally that no discovery of oil was made on the property involved in the McCutcheon case prior to June 6th, 1910, at which date a discovery was made, and oil and gas were produced by defendant Pacific Midway Oil Company. This discovery and production of oil was made under and pursuant to an oil placer location upon the

premises in question, of date February 12th, 1909, or possibly prior thereto. Under that location the Obispo Oil Company, as assignee of the locators of the land in controversy, entered upon the lands on or about March 1st, 1909, and began active operations in the matter of drilling for oil. After a well had been drilled several hundred feet it was found impossible to continue the operations thereat, whereupon the rig was moved, and a new well was started. Thereupon a second well was drilled to a depth of almost five hundred feet, when, some time during the month of July, 1909, the company having exhausted all of its available funds, the work was discontinued. On August 31st, 1909, the committee appointed by the stockholders of the company at a meeting held on the 30th day of July, reported that on August 5th they had visited Maricopa and had secured an agreement from the McCutchen brothers (the original locators hereinabove referred to) that the company might have an extension of ninety days during which to make arrangements to continue drilling operations. The committee further reported that they had discharged the employees, had shut down the well, and left the properties in charge of a keeper at a salary of $65 for the balance of the month of August. Some time in September a house on the land was occupied by a care-taker, who continued thereon, without salary, until March 1st, 1910. The Obispo Company never resumed work on the claim. Some time during the latter part of February following, the Pacific Midway Oil Company, as an assignee or successor in interest of the Obispo Oil Company, began operations on the property.

The two old wells hereinabove referred to were examined by the Pacific Midway Company and after some experimentation were found unserviceable, whereupon the drilling rig was moved and a third

and entirely new well started. This was in March, 1910. The work was pushed forward with diligence and a discovery of oil was made by the medium of such well on June 5, 1910. Thereafter other companies, referred to in Judge Dooling's opinion, went upon the property and after some large expenditures of money produced oil in paying quantities. In this connection it may be suggested that upon the refusal by the land office, as hereinabove referred to, to issue a patent to the Pacific Midway Oil Company, an opinion was rendered and from such opinion, containing a statement of the facts involved, the foregoing summary has been taken. This I do, not that I feel that the Court is bound, in this proceeding, by the finding of fact of the land department of the government, but because of my belief that the facts as stated in said opinion are in accordance with the truth of the controversy.

With reference to the situation existing on the date of the Presidential withdrawal order of September, 1909, it may be said, that in addition to the facts as stated by the Commissioner of the General Land Office in his opinion, one of counsel for the defendants in his brief says: "The caretaker had been in the employ of the Obispo Oil Company and was then working on an adjoining piece of property, and lived, with his family, on this property, rent free, and with the assurance of further employment when operations should be resumed." Another counsel, in the brief used before the land department and also presented to the Court herein for its consideration, said with reference to the transaction occurring on or about the date of the withdrawal order: "The continued active operations of the Obispo Company embraced a period from February, 1909, to August 5th. During this period they drilled well No. 1 to a depth of five hundred feet, when they encountered shift boulders which crushed the

pipe. Then they moved the rig a short distance away and started drilling. In this they reached a depth of 470 feet, when operations were suspended—August 5th, 1909—by reason of financial difficulties. On this date a committee of stockholders of the Obispo Company visited the ground. Up to this time there had been expended by the Obispo Company somewhere between fifteen thousand and eighteen thousand dollars on this venture. The committee ordered the operations stopped, put Watterson, one of the drillers, in charge to take care of the property at a salary of $65 per month, and secured from McCutchen brothers, by W. C. McCutchen, an agreement permitting a suspension of drilling for ninety days. * * * At this time and subsequent to September 10th, 1909, a man by the name of May and his wife moved into the house on the quarter at the instigation of the Obispo Company to hold possession of the property. Watterson, who had been employed by the committee of the Obispo stockholders, left about September 9th. The Mays were simply holding possession by residence on the ground, but were not paid employees. May was subsequently employed when operations were resumed by the Pacific Midway." * * * "It is conceded that between August 5th, 1909, and until operations were resumed by the Pacific Midway in February, 1910, that there was no active drilling upon the property. From August 5th until September 10th, 1909, Watterson was in possession as an employee of the Obispo. Thereafter May and his wife moved in *for the purpose of holding possession.* No salary was paid them, but they entered into possession *simply to hold it for the Obispo Company.*" (Italics mine.)

By a reference to the decision of the Supreme Court in the Midwest case, *supra,* it will be observed that though the Presidential order of withdrawal

of September 27th, 1909, purported to withdraw from all forms of location or settlement under the mineral or non-mineral public land laws, all the public lands specifically referred to in the lists accompanying the withdrawal order, yet this important exception was engrafted upon that order, viz: "All locations or claims *existing and* valid on this date may proceed to entry in the usual manner after filing, investigation and examination." (Italics mine.) It is obvious that it was not and could not have been the intention of the President, acting for and in behalf of his principal the United States government, to except from the operation of the withdrawal order all claims or locations that might then be subsisting upon lands included within such order. Special pains were taken to indicate that the intention of the executive was that only *"valid"* locations or claims were to be excepted from the general operation of the withdrawal order. In order to ascertain the extent of this exception it is necessary to define what, under the law, and within the meaning and true intent of the Presidential action, constitute a *"valid"* location or claim. In this behalf it should be remembered that "valid" is defined as "good or sufficient in point of law; efficacious; incapable of being rightfully overthrown or set aside; sustainable and effective in law, as distinguishable from that which exists or took place in fact or appearance, but has not the requisite to entitle it to be recognized and enforced by law." (Cent. Dict.)

What constitutes a "valid" mineral oil location, one "sustainable and effective in law" is very succinctly stated by the Supreme Court of California in *McLemore* v. *Express Oil Company,* 168 Cal. 559, p. 561 *et seq.* It is therein stated: "The principle has become axiomatic that discovery and appropriation are the source of title to mining claims, and

that assessment or development work is the condition of their continued possession. But this rule applies only when the location is valid and complete. And a location is valid and complete only when, after compliance with other requirements, a discovery of valuable minerals in place has been made. In the cause of ordinary minerals little or no difficulty has been experienced by the courts in this matter. In practice, the miner went upon the public domain, and, before he took the trouble to stake his claim and post and record his notice he made discovery. The staking of the boundaries of the claim and the posting of notice follows such discovery. When, however, Congress enacted that locations could and should be made of public lands containing petroleum or other mineral oils under the laws relating to placer mining claims (Act Feb. 11, 1897, 29 Stats. at Large, ch. 216, p. 526; U. S. Comp. Stats. 1901, p. 1435), the courts were at once confronted with serious difficulty in their endeavor to obey the congressional mandate, and fit the placer mining laws to the exigencies of oil locations which, in their nature, were radically dissimilar. Thus, it is well established, that the sole power of disposition and control of the public lands being vested by the constitution of the United States on Congress (Const. U. S., art. IV, sec. 3), Congress could at any time change its policy in regard to those lands so long as vested rights were not impaired. It was fully established also that a qualified person, who had made a valid location upon a part of the public mineral domain (which valid location always, of course, includes discovery), acquired vested rights, which no change in congressional policy could affect or impair, but *per contra,* that *a change in policy could impair the rights of one upon the public domain who had not acquired a valid location.* As has been said, in the case of other minerals, discovery preceded the demarkation of the boundaries,

the posting and recording of the notice. In the case of oil, discovery, in the very nature of things, would rarely or never be made except at the end of much time and after the expenditure of much money, the discovery of oil involving the erection of a derrick, the installation of machinery and the laborious drilling of a well, frequently to the depth of three thousand feet or more. If, therefore, the placer mining laws, which were declared by Congress to be the only laws under which oil locations could be established, were to be made of any practical benefit to the oil locator, it must be by permitting him to mark the boundaries of his location and post and record his notice, and *by protecting him in possession while he was with diligence prosecuting the labor of digging his well to determine whether or not a discovery could be made.* So it was held by the Federal Courts, by the courts of some of the other States, and by this court in *Miller* v. *Chrisman,* 140 Cal. 447 (98. Am. St. Rep. 63, 73 Pac. 1084, 74 Pac. 444), to the following effect: "One who thus in good faith makes his location, remains in possession and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. Such entry must be always peaceable, open and above board, and made in good faith, or no right can be founded upon it. (*Weed* v. *Snook,* 144 Cal. 439 (77 Pac. 1023); *Cosmos etc. Co.* v. *Gray Eagle Oil Co.,* 104 Fed. 20, 112 Fed. 4, (50 C. C. A. 79); 190 U. S. 301 (23 Sup. Ct. 692); *Whiting* v. *Straup,* 17 Wyo. 1 (129 Am. St. Rep. 1093, 95 Pac. 849); *Moffatt* v. *Blue River etc. Co.,* 33 Colo. 142 (80 Pac. 139). But it is always to be borne in mind that until the perfection of the inchoate and incomplete location by discovery, the locator has, first, no vested rights which Congress is obliged to recognize. So that Congress may change its policy

in regard to the lands to the extent even of excluding therefrom the diligent operator who has not made discovery. However inequitable such a proceeding might be, it in no way would be illegal * * * What the attempting locator has, is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, *while he is diligently prosecuting his work to a discovery.* This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile or unused brick. *It means the diligent continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view.*" (Italics mine.)

The gist of this decision, as I read it, is that after entry, and the initiation of the mineral placer claim by the oil locator, he has no vested right as against the government until he makes a discovery of oil upon the lands in question. In other words, the posting or recording of his oil placer claims gives him no rights as against the government until by discovery of oil it is made apparent that the land is in truth and in fact mineral land and subject to location under the mineral law. Having, however, initiated his claim, by the posting of his notices, he is protected as against third persons, as long as he "remains in possession and with due diligence prosecutes his claim toward a discovery." As long as he thus conducts himself, though as against the government he has no vested rights, nevertheless, he has rights which ought to be by all parties respected.

And, in this spirit, all locators who were thus conducting themselves at the time of the making of the withdrawal order, had their rights respected by the President by the exception contained therein,

and hereinabove referred to. That is to say, on the date that the withdrawal order was made, if any locator was then on withdrawn lands, in possession, and was "with due diligence" prosecuting his work toward a discovery of oil, by the express provisions of the withdrawal order, it did not affect him, he had a "valid" location, and he could, despite the general terms of the order, "proceed to entry in the usual manner," that is, proceed to a discovery and thereby perfect his right to the mineral claim. If, however, at the date of the withdrawal order such locator was not in possession, or was not with "due diligence" prosecuting his work toward a discovery, then he had no "valid" location, and in virtue of the efficacy of the withdrawal order as an act of a duly authorized agent of the United States government in that behalf, the order served to withdraw from further entry, location, settlement, or other disposal, the land so claimed by such locator. Furthermore, if, notwithstanding such situation, such locator, conceiving the withdrawal order to be entirely invalid, thereafter began or resumed operations looking to a discovery of oil upon his claims, he was met by the terms of the order itself to the effect that the land was no longer open to entry or claim, and that, as between him and the government, all subsequent efforts of his could not serve to divest the government of its proprietary title therein.

The Supreme Court having determined, after most careful consideration, that the withdrawal order in question was valid in its every aspect, and effectual as serving to withdraw from entry or settlement the public lands referred to therein, it indubitably follows that any entry made or claim initiated upon such land so withdrawn subsequent to the date of such withdrawal order, and while the same was in full force and effect, would be void and futile as against the proprietary rights of the United States

government. If discoveries of oil were made subsequent to the withdrawal order in virtue of claims initiated, however, prior thereto, and if at the time of the making of such order the locators of their successors were in occupation of the property claimed, and were at that time diligently engaged in the prosecution of the work looking to a discovery of oil therein they would be protected in their rights by the express terms of the withdrawal order itself. If they were not so engaged with diligence in endeavoring to effect a discovery of oil, then their rights would be no greater than, or different from, the rights of one who might have entered upon withdrawn lands subsequent to the date of the Presidential order, and as to such an one the Supreme Court has said in the Midwest case that his rights were *nil*.

In the Midwest case, with respect to the validity of the withdrawal order, and as its ultimate conclusion thereon, the Supreme Court said: "The long continued practice of acquiescence in Congress, as well as the decisions of the Court all show that the President had the power to make the order. And as was said in *Welsey* v. *Chapman,* 101 U. S. 769, the *'withdrawal would be sufficient to defeat a settlement * * * while the order was in force.'*" In this connection it might be well to observe that the order remained in force until some congressional action or some other executive action annulled it. No congressional action was ever had in that behalf (Midwest Oil case, *supra*), and no executive action, except in so far as the withdrawal order of July, 1910, served to ratify it.

The claim seems to be made, and if I understand the opinion of the Land Department aright, is given recognition therein, that the scope or comprehensiveness of the withdrawal order of September, 1909,

was in some wise affected or enlarged by the so-called Pickett Act, passed June 25th, 1910. (36 Stat. 847.) The Supreme Court in the Midwest case, *supra,* held that there was nothing in that Act "indicating the slightest intent to repudiate the withdrawals already made under the executive order of September, 1909." The Court also said that "the legislative history of the statute shows that there was no such intention and no purpose to make the Act retroactive or to disaffirm what the agent in charge had already done."

It would seem to me that since the Act in question was passed some months after the promulgation of the executive order, and it having been held by the Supreme Court not to have been in any degree an impairment of that order, the conclusion ought to follow that the Act in no wise or at all affects the scope or purpose of the order. If it have any effect all, however, it is, in my judgment, in support of the conclusions hereinabove announced by me with respect to the general effect of the withdrawal order: this follows because by the terms of the Act itself it is provided that "the rights of any person who, at the date of any order of withdrawal heretofore * * * made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is *in diligent prosecution of work* leading to discovery of oil or gas, shall not be affected or impaired by such order, *so long as such occupant or claimant shall continue in diligent prosecution of said work.*" (Italics mine.) If this provision amounts to anything at all it is tantamount to a declaration on the part of Congress itself to the effect that one who would claim the benefit of a location initiated previous to the promulgation of the withdrawal order but not followed by a discovery until after the order, must have been, at the date of the withdrawal order, in diligent prosecution of work leading to a

discovery of oil, and must have continued in such diligent prosecution until a discovery was effectuated.

If I am correct in my views of the law as hereinabove declared, the claims of the defendants in the Kinsey and Midland Oilfields Company cases, having been initiated subsequent to the promulgation of the withdrawal order of 1909, have no force or validity as against the holder of the paramount title, the government, and defendants' intrusion into, and trespass upon, the lands covered by such claims, stand without warrant; in consequence their further waste thereof should be enjoined, and the operation of the oil properties thereon should be committed to the hands of a receiver of this Court pending a final judgment quieting complainant's title thereto.

With respect to the questions involved in the McCutchen case I find much greater difficulty in arriving at a conclusion satisfactory to myself. I am persuaded that if under the law as stated, the Obispo Company had not a "valid" location at the date of the withdrawal order of 1909, then the subsequent efforts of their successors and assignees could not and should not be permitted to create a title to, or valid claim upon, withdrawn land. The real difficulty in the case, in this behalf, centers around a determination of the question as to whether or not the Obispo Company was "with due diligence" prosecuting its work toward a discovery of oil on its placer claim at the time of the promulgation of the withdrawal order. The Land Department, in the opinion hereinbefore referred to, has held that it was not prosecuting its work with due diligence at that time and that in consequence its claim was not valid. This conclusion of that department, confessedly, is not binding upon the Court and perhaps it ought not to be at all persuasive

with it. After a very careful consideration of the facts, however, as adduced from the record, and as admitted by counsel, and indicated hereinabove, I can come to no other conclusion than that the Obispo Oil Company was not prosecuting its work toward a discovery of oil with due or even any diligence at the time of the withdrawal of its land.

Recurring to the facts in the case, it will be remembered that the Company, because of a visit of its stockholders to the ground, and *because all of its available funds were exhausted,* discontinued and actually ceased work looking to a discovery of oil, on or before the 5th day of August, 1909, almost 60 days previous to the promulgation of the withdrawal order. It thereupon secured an extension of time under its contract with the original locators of the land, within which it might delay a resumption of operations. This extension of time lasted until November 5th, 1909, but nothing was done on the property at that time nor until more than three months thereafter. It further appears that the committee of stockholders discharged the employees and left the property in charge of a keeper under salary for a very short time. Thereafter a man, working on an adjoining piece of property, at the instigation of the Obispo Oil Company, moved onto the property and lived there, rent free, *"simply to hold it for the Obispo Company."* Upon this state of facts it would seem to me as if the Court, upon the trial, would be compelled, indubitably, to indulge in the conclusion as a matter of law that no due diligence looking to a discovery of oil upon the property was evident, either at the date of the withdrawal order or for some months subsequent thereto. (*McLemore* v. *Express Oil Company,* 158 Cal. 559; *Borgwardt* v. *McKittrick Oil Company,* 164 Cal. 650; *Ophir Silver Mining Company* v. *Carpenter,* 4 Nev. 534.)

The point is made and urged with much force that it should not be held that the Obispo Company was lacking in diligence at the date of the withdrawal order, because they had theretofore expended a sum of approximately twenty thousand dollars in an endeavor to make a discovery of oil on the lands in question, and it is apparently insisted that that expenditure in itself, is amply sufficient to refute the claim of a want of diligence. It should be remembered, however, with respect to this, that under the facts shown, all efforts made by the Obispo Company in connection with the expenditure mentioned, were fruitless and the wells attempted to be sunk through such expenditure have actually, ever since on or about the 5th day of August, 1909, been abandoned, and if the defendants were given a clear title to all the land in question at this time, the expenditures made and relied upon herein by the Obispo Company would still constitute a false factor in their claim of title, because no muniment thereof would rest upon such expenditures. In other words, no discovery of oil at any time upon the premises in controversy in the McCutchen case was made through, or by means of, or at a place developed by, the monies laid out by the Obispo Company. When the Pacific Midway Oil Company, in the latter part of February 1910, took over the rights of the Obispo Company and entered upon its property, it examined the wells theretofore sought to be sunk to the oil sands by the Obispo Company, but found them upon such examinations wholly unserviceable, and actually sunk the wells which resulted in the discovery of oil, at a different place. In this wise it may be said, as I view the situation, that the expenditures of the Obispo Company as heretofore indicated, contributed in no degree or respect to the discovery of oil, and should not now be held as evidence of due diligence at the time of the withdrawal order.

In somewhat similar vein it is also urged that it would be highly inequitable, now, for the government to retake the title, so to speak, of these lands, after the defendant companies have gone upon them and made the expenditures of hundreds of thousands of dollars in the prosecution of work leading to a discovery and extracting of oil shown here by the facts. The simple and sufficient answer, however, to this contention is that all of these defendants went upon these lands at a time when they knew that they had been withdrawn from entry and settlement by order of the President of the United States. If they relied upon a claim initiated previously to such withdrawal, it was their bounden duty, under the circumstances, to investigate and consider whether or not such claim was "valid" and therefore within the protective provisions of the executive order. What they did, then, in that state of the case and in disregard of their duty to investigate, they must be held, and held rightly, to have done at their own risk. That they misconceived the law and determined in their own minds that the withdrawal order of 1909 was invalid, does not suffice, in the judgment of this Court, to secure for them any rights because of the expenditure made under such misconception. The Government of the United States did nothing to lead them to believe that the withdrawal order was invalid, and to hold that a party may deliberately refuse to recognize a valid executive order and thereby and because of such refusal profit himself, is to put at once a premium upon disregard of law and constituted authority, and make it the rightful privilege of every one to misconceive and disregard the law if in so doing he will thereby advantage himself. I can not believe such to be a safe or salutary rule, and in consequence feel that there are no equities of any sort or nature inuring to the benefit of those who now claim rights in these public lands merely because

of their disregard of the Presidential order of withdrawal thereof, and of their financial ability and willingness thereafter to prosecute to a successful conclusion a discovery of minerals thereon.

The contention is urged in the McCutchen case that a receiver should not at this time be appointed because of the fact that Judge Dooling has heretofore refused to make such appointment, and the claim is made that there is no change in the situation now from what it was at the time of the action of Judge Dooling. Waiving all other considerations, however, it may be said that the last premise is not well taken. There are two changes in respect of the situation differentiating it from that contemplated by Judge Dooling. In the first place, the withdrawal order which Judge Dooling held to be invalid had since been declared entirely valid by the highest court in the land. In the second place, and of more than slight importance, in my judgment, the Land Department of the Government, for reasons entirely satisfactory to itself, no doubt, has refused to grant a patent to the defendants to the precise lands in dispute. While this fact alone would not, in my judgment authorize or justify the appointment of a receiver by this Court at this time, nevertheless it may be taken into account in determining whether or not, in view of the changed situation, plaintiff may not be entitled to renew his application.

The point is also made that the Government being out of possession, is not entitled to a receivership in advance of a judgment in its favor in an action at law, awarding to it the possession of the various premises in controversy. Owing to the rapidity, however, with which the very substance of plaintiff's property is being wrongfully, as I view it, depleted, it is obvious that to deny plaintiff the provisional relief it seeks of this Court at this time, until it

should, perchance, have been victorious in an action at law, would be most successfully to deprive it of all the substantial fruits of the victory which that self same action at law would secure. If plaintiff is possessed of any rights in and to these properties, it is entitled to assert them now, because, in view of the continuous extraction of oil—the only valuable element of the properties,—the mere lapse of time in itself would suffice to deprive plaintiff of its valuable and most substantial rights in their entirety. As is said in 34 Cyc., p. 17, the appointment of a receiver is made by a Court of Equity, in the performance of one of its prerogative functions, in order to enable the Court to accomplish as far as practicable, *complete justice between the parties.* Assuming, as I am led to assume, the ownership of, and right to, the products of the lands in controversy herein by the Government of the United States, there would seem to be no doubt, in order, under the circumstances, that complete justice may be done as between the Government on the one hand and the defendants on the other, that receivers should be appointed, and injunctions in restrain of waste should be awarded, as the same have been prayed for.

Appropriate orders, embodying these conclusions, will be drafted by the Government's counsel.

BLEDSOE,

Judge.

APPENDIX

Chap. 421.—An Act to authorize the President of the United States to make withdrawals of public lands in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Sec. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided,* That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further,* That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided*

further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry heretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further,* That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

Approved, June 25, 1910.